Supreme Court U.S.
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No. 02-851

IN THE

Supreme Court of the United States

KAREN L. WINTERS,

Petitioner,

v.

MTL SYSTEMS, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS MTL SYSTEMS, INC. AND ARNOLD FIFE

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QUESTIONS PRESENTED

1. Whether, under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. § 2000e *et seq.*, *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 118 S. Ct. 2257 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S. Ct. 2275 (1998), the existence of an anti-harassment policy with complaint procedures and an employer's adequate response to a supervisor's alleged harassment insulate the employer from liability for a hostile environment when the employee's failure to promptly report the alleged harassment was unreasonable and permitted the harassment to become severe or pervasive?

2. Whether, under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. § 2000e *et seq.*, *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 118 S. Ct. 2257 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S. Ct. 2275 (1998), an employer is precluded from asserting an affirmative defense when an employee unreasonably fails to take advantage of preventive or corrective opportunities provided by the employer by failing to report the alleged harassment over an extended time period so as to permit it to become severe or pervasive with no explanation for this failure?

STATEMENT PURSUANT TO RULE 29.6

Respondent MTL Systems, Inc. is a publicly traded corporation. There is no parent or publicly held company owning ten percent (10%) or more of the corporation's stock.

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STATEMENT OF THE CASE

Petitioner Karen Winters ("Petitioner" or "Winters") began working for Respondent MTL Systems, Inc. ("MTL") as a member of its clerical support staff on September 27, 1995. Respondent James McCracken ("McCracken") was her supervisor throughout her employment with MTL.

Immediately prior to March 8, 1996, Winters received a summons from the Greene County, Ohio Common Pleas Court for grand jury service. On March 8, 1996, just days before she was to begin jury service, Winters approached John Ream, MTL's Vice President of Administration, and told him that McCracken had made unwelcome advances to her and that she was uncomfortable around him. Ream advised Winters that she should contact Sue App, MTL's Manager of Human Resources.

After Winters left Ream's office, Ream immediately called App and reported his conversation with Winters. App called Winters that same day and met with her to discuss the problems that Winters claimed she was having with McCracken. Winters admitted that McCracken's inappropriate behavior had begun shortly after she began working at MTL in 1995.

Although Petitioner claims that "it is equally clear that Winters did not unreasonably delay or fail to take advantage of any preventive or corrective opportunities provided by MTL Systems, Inc. or fail to take appropriate action to avoid harm otherwise," her delay in reporting the alleged harassment suggests otherwise. As noted above, Winters admitted that the harassment began shortly after her employment at MTL commenced in Fall 1995, but she failed to report the harassment until March 1996.

Upon receiving Winters' complaint, App assured Winters that she would investigate the matter and that, if Winters had any further problems, she should contact App immediately. App then immediately contacted McCracken and asked him to respond to Winters' accusations. Although McCracken denied the allegations, App nevertheless instructed him to avoid being alone with Winters, to maintain physical distance, and to discuss only business matters with Winters. Both App and Ream informed Respondent Arnold Fife, MTL's President and CEO, about Winters' complaint.

For the next several weeks, App and Ream visited Winters' work area to assure themselves that the matter had been resolved. App and Fife also interviewed several employees who worked near Winters, and no one confirmed Winters' accusations. In addition, Fife met with McCracken and issued the same kinds of conditions to him as had App. Winters never complained of inappropriate comments or behavior by McCracken to anyone in MTL management after her conversations with Ream and App on March 8, 1996.

Winters continued to work at MTL. During this time, she claimed to be serving on the grand jury for the Greene County, Ohio Common Pleas Court. During this five-month period, Winters reported over 200 hours of grand jury service on her MTL employee time cards which she had not performed. She also presented MTL with purported official documentation verifying her grand jury service which she had, in fact, forged. Upon the Greene County Prosecutor's discovery of her scheme, Winters was arrested and indicted on two felony charges to which she pled guilty.

Winters was terminated after she confessed her crimes to the police and was indicted. She later sued MTL, McCracken and Fife, alleging numerous claims arising out of the employment relationship. The only one at issue here is Winters' claim against MTL for sexual harassment under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*.

After exhaustive discovery, all parties filed cross-motions for summary judgment. The Magistrate Judge sustained MTL and Fife's motion for summary judgment as to all claims alleged in Winters' complaint. The District Court adopted the Magistrate Judge's report and recommendation in its entirety. The District Court sustained MTL's motion for summary judgment with regard to Winters' claim for sexual harassment under Title VII because it found that no tangible employment action was taken against Winters due to the alleged harassment. The District Court further found that MTL could avail itself of the affirmative defense enunciated by this Court in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 118 S. Ct. 2257 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S. Ct. 2275 (1998) because MTL took "reasonable steps to prevent sexual harassment and to cure what it was told had happened."

Upon Winters' appeal to the Sixth Circuit Court of Appeals, the Court affirmed the District Court's findings adopting the Magistrate Judge's "well-reasoned report and recommendation."

The case is now before this Court upon Petitioner's challenge to the lower courts' application of the affirmative defense, and specifically the lower courts' application of the second prong of the affirmative defense.

REASONS FOR DENYING THE PETITION

I. The Sixth Circuit Court of Appeals Properly Applied the Employer's Affirmative Defense Established By This Court in *Burlington Industries, Inc. v. Ellerth* and *Faragher v. City of Boca Raton* in Accordance with Both Congress' Purpose in Enacting Title VII and the Principles Enunciated By This Court in Formulating the Defense.

A. The Sixth Circuit Court of Appeals Properly Applied the Affirmative Defense to the Facts of This Case.

In 1986, this Court addressed the issue of employer vicarious liability for sexual harassment in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 106 S. Ct. 2399 (1986), and held that agency principles imposed constraints on an employer's vicarious liability. However, that decision did not resolve the exact parameters of employer vicarious liability for workplace sexual harassment. In 1998, this Court addressed the specific issue of employer vicarious liability where a supervisor creates a hostile work environment through sexual harassment in the companion cases of *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 118 S. Ct. 2257 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S. Ct. 2275 (1998).

In *Ellerth* and *Faragher*, this Court stated:

> An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over

> the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence. *Ellerth*, 524 U.S. at 765, 118 S. Ct. at 2270; *Faragher*, 524 U.S. at 807, 118 S. Ct. at 2292-93.

Here, the Petitioner's Title VII sexual harassment claim is based upon her supervisor's alleged creation of a hostile work environment. Petitioner does not dispute that no tangible employment action was taken against her. MTL was therefore entitled to assert the affirmative defense to liability set forth by this Court:

> The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. *Ellerth*, 524 U.S. at 765, 118 S. Ct. at 2270; *Faragher*, 524 U.S. at 807, 118 S. Ct. at 2293.

The District Court and the Sixth Circuit properly determined that MTL was entitled to summary judgment based upon its assertion of this affirmative defense. The lower courts found that MTL had exercised reasonable care to prevent and correct promptly sexually harassing behavior in response to Winters' March 8, 1996 allegations. MTL had a company policy against sexual harassment in place prior to and during the period of the alleged harassment. This policy was widely distributed to and well known by its employees.

The District Court found, and the Sixth Circuit affirmed, that this was certainly a reasonable means to prevent occurrences of sexual harassment.

The District Court also noted that the Petitioner alleged that the harassing behavior began shortly after her employment with MTL commenced on September 27, 1995. However, she failed to make any complaint to MTL until March 8, 1996, and even then complained only of sexual content comments and her supervisor's offer to buy dinner and to visit her home. She did not complain of any physical contact or quid pro quo behavior on the part of her supervisor. Although the District Court did not expressly make a specific finding with regard to the second prong of the affirmative defense, its consideration of that prong was inherent in its decision.

In considering the Petitioner's allegations about her supervisor's behavior, the District Court found that MTL "immediately confronted the alleged harasser, advised him that any conduct in which he had engaged was being perceived by his subordinate as sexual harassment and must stop, visited the work site to see if there was any evidence of the problem, and waited to see if the victim had any further complaints." The District Court and Sixth Circuit properly found that MTL's prompt response was "eminently reasonable" under the circumstances.

The lower courts' findings demonstrate that MTL satisfied both prongs of the *Ellerth/Faragher* affirmative defense, and was entitled to summary judgment on the Petitioner's Title VII claim.

B. The Sixth Circuit Court of Appeal's Decision is Consistent with Both Congress' Purpose in Enacting Title VII and the Principles Enunciated By This Court in Formulating the Defense.

The Petitioner argues that the District Court and the Sixth Circuit improperly allowed MTL to prevail on the *Ellerth/ Faragher* affirmative defense because neither court properly analyzed the second prong of the affirmative defense. However, Petitioner's interpretation is erroneous and based upon an inappropriately narrow reading of *Ellerth* and *Faragher*. Most critically, the facts of those cases differ substantially from those present here.

Ellerth involved an employee who failed to inform anyone in authority about her supervisor's harassing behavior despite knowing that the employer had a sexual harassment policy. *Ellerth*, 524 U.S. at 748, 118 S. Ct. at 2262. *Faragher* involved an employee who failed to report sexual harassment to higher authorities, and an employer who also failed to disseminate its sexual harassment policy to the department where the alleged harassers and victims were employed. *Faragher*, 524 U.S. at 781-82, 118 S. Ct. at 2280-81. This Court accordingly did not address application of the defense in circumstances involving facts, such as those present here, where the employer acted reasonably to prevent and promptly correct harassing behavior after a delayed report of harassment by the employee.

However, this Court's reasoning in *Ellerth* and *Faragher* support application of the defense under these circumstances. This Court found that Title VII's deterrent purpose supports limited employer vicarious liability when effective grievance mechanisms exist and employees are encouraged to report

harassing conduct before it becomes severe or pervasive. *Ellerth*, 524 U.S. at 764, 118 S. Ct. at 2270. This Court accordingly found that the employer has an affirmative defense when an actionable hostile environment exists, when the employer shows that it acted reasonably to prevent or correct promptly any sexually harassing behavior and the employee did not act reasonably to avoid harm. *Id.* at 764-65, 118 S. Ct. at 2270. That is, the employee must "report harassing conduct before it becomes severe or pervasive" and thus attempt to avoid the harm. *Id.* at 764, 118 S. Ct. at 2270.

In sum, this Court recognized that "Title VII borrows from tort law the avoidable consequences doctrine" and thus it limited employer vicarious liability for harm to that which the employee could not avoid. *See id.* As this affirmative defense only comes into play in a case where an actionable hostile environment exists because the harassment is severe or pervasive, the affirmative defense limits the employer's vicarious liability when the employee could have prevented the environment from becoming actionable and the employer acted reasonably in preventing or correcting alleged harassment.

As noted by a Texas district court, the parameters of the defense, especially the second prong, are best understood by looking to this Court's rationale in adopting the affirmative defense. *See Mirakhorli v. DFW Management Co.*, No. 3:94-CV-1464-D, 1999 U.S. Dist. LEXIS 9344, at *23 (N.D. Tex. May 24, 1999). The policies cited by this Court in formulating the employer's affirmative defense, as well as Congress' purpose in enacting Title VII, must guide the courts in application of this defense.

In formulating the employer's affirmative defense, this Court expressed its desire to "accommodate the agency principles of vicarious liability for harm caused by the misuse of supervisory authority, as well as Title VII's equally basic policies of encouraging forethought by employers and saving action by objecting employees." *Ellerth*, 524 U.S. at 764, 118 S. Ct. at 2270. This Court noted that the primary objective of Title VII is not to provide redress, but to avoid harm. *Faragher*, 524 U.S. at 806, 118 S. Ct. at 2292:

> It would therefore implement clear statutory policy and complement the Government's Title VII enforcement efforts to recognize the employer's affirmative obligation to prevent violations and give credit here to employers who make reasonable efforts to discharge their duty. Indeed, a theory of vicarious liability for misuse of supervisory power would be at odds with the statutory policy if it failed to provide employers with some incentive. *Id.*

Petitioner's interpretation of the second prong of the affirmative defense is incorrect because Petitioner ignores this reasoning and these policy considerations. Adoption of the theory urged by Petitioner is at odds with the statutory policy recognized by this Court, and this Court's attempt to balance the respective duties of employers and employees. It essentially holds an employer strictly liable for sexual harassment, despite the fact that the employer acted reasonably to prevent harm, and acted reasonably to promptly correct harassment that did occur once it had knowledge, and the employee did not act reasonably to prevent harm by reporting the alleged harassment before it became severe or pervasive. It would result in an affirmative defense that

is really no defense at all where the employee reports the sexual harassment, regardless of the reasonableness of the employee's actions.

The very law review article cited by Petitioner criticizes such a position, as well as the case cited by Petitioner in support of her contention. *See* David Sherwyn et al., *Don't Train Your Employees and Cancel Your "1-800" Harassment Hotline: An Empirical Examination and Correction of the Flaws in the Affirmative Defense To Sexual Harassment Charges*, 69 FORDHAM L. REV. 1265, 1267, 1293 (2001). As this article points out, Petitioner's position is contrary to that of most courts that have considered the issue. "Most courts that have interpreted the affirmative defense have refused to hold employers who responded properly to complaints of sexual harassment liable for the actions of their supervisors." *Id.* at 1294. In accordance with Congress' intent, "most courts wish to reward employers for doing what they should to prevent and correct harassment." *Id.*

The Petitioner cites *Moore v. Sam's Club*, 55 F. Supp. 2d 177 (S.D.N.Y. 1999), in support of her contention that the *Ellerth/Faragher* affirmative defense is unavailable to an employer where the employee reports the alleged harassment. The New York district court found that the employer had not met the second prong of the affirmative defense. It found that the affirmative defense applied in situations where the employee failed to report the harassment despite knowing that the employer had a policy against sexual harassment. *See id.* at 192. The court concluded that employers are liable for the sexual harassment of supervisory employees, even if the employer acted reasonably, "'so long as the plaintiff in question fulfilled her duty of reasonable care to avoid harm.'" *Id.* at 193 (quoting *Ellerth*, 524 U.S. at 773, 118 S. Ct. at

2274 (Thomas, J., dissenting)). Because the employee had taken advantage of the employer's sexual harassment complaint procedure, the affirmative defense was unavailable to the employer.

However, such a result ignores this Court's requirement in the second prong of the defense that the employee report harassing conduct before it becomes severe or pervasive and creates "an incentive for employers to refrain from doing all they can to prevent and correct harassment." Sherwyn, 69 FORDHAM L. REV. at 1293.

> Under this interpretation of the law, extra effort by the employers to prevent harassment (such as elaborate and expensive so-called "sexual-harassment training" for employees) might work against companies under the affirmative defense because employees at those companies may have a greater propensity to report, which will preclude the employer from satisfying the defense. *Id.* at 1294.

Accepting the Petitioner's interpretation would cause the anomalous result of encouraging employers to provide complaint procedures, but not to make employees too comfortable in using such procedures because if an employee actually uses them, the employer is worse off when it comes to asserting the affirmative defense. *Id.* Such a result is clearly at odds with Title VII's purpose of preventing and remedying harassment.

The Fifth Circuit recognized these policy considerations in applying the affirmative defense in situations where the employer has acted reasonably. *See Indest v. Freeman Decorating, Inc.*, 164 F.3d 258 (5th Cir. 1999). The plaintiff

was subject to sexual harassment from her supervisor. She immediately reported the harassment, and the employer acted immediately to address the issue. *See id.* at 260. No further incidents of harassment occurred thereafter. *Id.*

The Fifth Circuit relied upon the principles enunciated in *Faragher* and *Ellerth* in concluding that the employer should not be held vicariously liable. *Id.* at 265. The court discussed the policy behind Title VII in reaching its conclusion. When an employee promptly complains about sexual harassment, the employee can thwart the creation of a hostile work environment, and receive the benefits that Title VII was meant to confer. *Id.* An employer's prompt response should also protect it from liability because the employer "forestalled the creation of a hostile environment." *Id.* at 266.

The *Indest* court further stated: "Imposing vicarious liability on an employer for a supervisor's 'hostile environment' actions despite its swift and appropriate remedial response to the victim's complaint would thus undermine not only *Meritor* but Title VII's deterrent policy." *Id.*

In addition to undermining Title VII's deterrent policy, the court cited the policy behind agency law in support of its conclusion:

> A standard imposing vicarious liability notwithstanding the employer's (sic) having nipped a hostile environment in the bud would also conflict with the premise of *Ellerth/Faragher*, founded in agency law, that a supervisor who creates a hostile environment is aided by his agency status with the employer in doing so . . .

> Where the company, on hearing a plaintiff's complaint about inappropriate sexual behavior, moves promptly to investigate and stop the harassment, it eradicates any semblance of authority the harasser might otherwise have possessed. *Id.*

In light of these policy considerations, the interpretation of the employer's affirmative defense urged by the Petitioner must be rejected. Any incentive to enact a proactive and efficient harassment policy would be destroyed if employers are held liable despite their best efforts to prevent and correct harassment. Employers would be encouraged to forego the time and expense of implementing an effective sexual harassment policy, and instead take their chance in litigation. Such a result would clearly be in derogation of Congress' policy in enacting Title VII and the principles enunciated by this Court in establishing an employer's affirmative defense to a hostile environment claim. It would result in an affirmative defense that is really no defense at all. Analysis of these considerations lead inescapably to the conclusion that employers such as MTL should not be held vicariously liable for sexual harassment in circumstances where the employer has acted reasonably to prevent and promptly correct harassing behavior once it learned of it.

MTL was entitled to summary judgment because it satisfied both prongs of the affirmative defense. The Petitioner does not dispute the lower courts' findings that MTL acted reasonably to prevent and promptly correct the alleged harassment. The Petitioner instead argues that an employer will always be precluded from asserting the affirmative defense whenever the employee reports the sexual harassment, whether that report was timely or not.

The Petitioner's interpretation would essentially hold an employer vicariously liable for sexual harassment whenever the employee reports the harassment, regardless of the employee's reasonableness or fulfillment of his or her duty to avoid harm.

The Petitioner thus ignores the essential inquiry of the second prong. The second prong of the affirmative defense focuses on the reasonableness of the employee's response, not simply on whether or not the employee reported the harassment.

An employer's vicarious liability for sexual harassment must be examined in light of the timing of the employee's report and the employer's subsequent response. Where the employee reports incidents of sexual harassment immediately, the employer can prevent the creation of a hostile work environment by promptly addressing the problem. Where the employee fails to promptly report harassing behavior, and severe and pervasive harassment results, the employer must still be permitted to assert the affirmative defense to a hostile work environment claim. Where the employer corrects promptly the harassing behavior upon its receipt of the employee's complaint, the affirmative defense should protect the employer from liability for all harassment that occurred prior to its receipt of the complaint in most circumstances. This interpretation of the employer's defense is consistent with the nature of an affirmative defense in general.

This Court reaffirmed its focus on reasonableness in *Faragher* where it stated, "We hold that an employer is vicariously liable for actionable discrimination caused by a supervisor, but subject to an affirmative defense looking to

the reasonableness of the employer's conduct *as well as that of a plaintiff victim*." *Faragher*, 524 U.S. at 780, 118 S. Ct. at 2280 (emphasis added). As this Court recognized in *Faragher*, "If the victim could have avoided harm, no liability should be found against the employer who had taken reasonable care, and if damages could reasonably have been mitigated no award against a liable employer should reward a plaintiff for what her own efforts could have avoided." *Id.* at 807, 118 S. Ct. at 2292.

Here, Petitioner alleges that her supervisor's harassment began shortly after she commenced employment at MTL in September 1995. Yet the Petitioner failed to report the alleged harassment to anyone in an authoritative position at MTL until March 1996. MTL began investigating Petitioner's complaint the same day it received it. The Petitioner never made any further reports of harassment, nor has she even alleged that the harassment continued beyond the date of her report.

In addition to the Fifth Circuit decision cited above, several other appellate courts have considered and rejected arguments similar to those made by the Petitioner where the employee did not promptly report the harassment to her employer.

The Seventh Circuit has been mindful of the policies behind Title VII in applying the *Ellerth/Faragher* affirmative defense. *See Gawley v. Indiana University*, 276 F.3d 301 (7th Cir. 2001). In *Gawley*, the plaintiff alleged sexual harassment against another employee the plaintiff claimed was her supervisor. The plaintiff informally attempted to stop the harassment, but did not utilize the employer's formal complaint procedure until seven months after the alleged harassment began. *Id.* at 312.

The Seventh Circuit found that the university employer had met the first prong of the affirmative defense because it had a system in place for employees to report sexual harassment, and the university took action to effectively stop the harassment as soon as the plaintiff reported it. *Id.* at 311-12. With regard to the second prong of the defense, the court held that the employee had unreasonably failed to take advantage of the university's corrective procedures because she had waited seven months to make a formal complaint. *Id.* at 312.

The court noted that the requirements of the second prong of the affirmative defense are tied to Title VII's primary objective, which is to avoid harm rather than to provide redress. *Id.* The court affirmed the lower court's grant of summary judgment in the university's favor because the plaintiff failed to take advantage of the university's procedure in a timely fashion. *See id.*; *see also Matvia v. Bald Head Island Management, Inc.*, 259 F.3d 261 (4th Cir. 2001) (holding with regard to the second prong of the affirmative defense that employee's actions had to be examined from the time the unwelcome conduct began and the employer satisfied this prong because the employee failed to timely report the alleged harassment).

The Ninth Circuit reached a similar conclusion where the plaintiff failed to report the alleged harassment until four months after the harassment had ended, and nearly two years after it had begun. *See Montero v. Agco Corp.*, 192 F.3d 856, 859, 863 (9th Cir. 1999). The employer's sexual harassment policy, and its efforts to make all employees aware of the policy, established that it had exercised reasonable care to prevent harassment. *Id.* at 862. Its prompt investigation and action after the plaintiff did complain established that the

employer acted reasonably to promptly correct the harassment. *Id.* The plaintiff's failure to report the harassment earlier established that the plaintiff had unreasonably failed to take advantage of the employer's preventive and corrective opportunities, despite her awareness of them. *Id.* at 863.

Several district courts have reached the same conclusion. In *Arnold v. Yale New Haven Hospital*, 213 F. Supp. 2d 142 (D. Conn. 2002), the plaintiff alleged that he was subjected to sexual harassment by a supervisor employed by the hospital. *Id.* at 143-44. The plaintiff did not complain of the harassment until after a particularly offensive incident allegedly occurred. *See id.* at 144. The hospital investigated the incident, and ultimately terminated the supervisor. *Id.* The plaintiff did not work with the supervisor again after he complained to the hospital. *Id.*

The court found that the hospital had satisfied both prongs of the *Ellerth/Faragher* affirmative defense. *Id.* at 149. Specifically with regard to the second prong, the court held that the hospital had met its burden of proving that the plaintiff had unreasonably failed to take advantage of its complaint procedures. *Id.* The plaintiff had not reported the prior incidents of harassment to anyone prior to the particularly offensive act allegedly occurred. *Id.* The court stated, "Since Yale-New Haven had adopted and disseminated an anti-harassment policy which could have dealt with the prior harassment and most likely would have prevented the broomstick incident, it can hardly be held responsible for conduct of [the supervisor] not reported to anyone." *Id.*

The court determined that the hospital's response must be measured from the point at which the plaintiff first reported the incident to hospital authorities. *Id.* Because the

hospital acted swiftly and completely to address the harassment once such a complaint was made, it met both prongs of the affirmative defense. *Id.*

A Florida district court reached a similar result in *Walton v. Johnson & Johnson Services, Inc.*, 203 F. Supp. 2d 1312 (M.D. Fla. 2002). Therein, the plaintiff alleged that she was subject to harassment at the hands of her supervisor. The plaintiff did not report the harassment to her employer for nearly three months after the first act of alleged harassment. *Id.* at 1323. The court found that the employer had met the elements of the *Ellerth/ Faragher* affirmative defense. *Id.* at 1325.

With respect to the second prong of the affirmative defense, the court found that the plaintiff had failed to act reasonably to prevent harm. *See id.* at 1324-25. Although it was undisputed that the plaintiff had taken advantage of the employer's preventive and corrective opportunities, the question was whether the plaintiff had acted reasonably because she failed to promptly report the alleged harassment. *Id.* at 1323-24. The court found that the plaintiff was not excused from acting in a reasonably prompt manner in taking advantage of the preventive and corrective opportunities provided by the employer, and had further failed to "otherwise avoid harm" by placing herself in situations that permitted further harassment by her supervisor. *Id.* at 1324, 1324 n.17; *see also Guerra v. Editorial Televisa-USA, Inc.*, No. 97-3670-CIV, 1999 U.S. Dist. LEXIS 10082, at *38 (S.D. Fla. June 4, 1999) (holding that employer was entitled to prevail on affirmative defense where the employee failed to promptly complain about alleged harassment because employer should not be held liable "for conduct about which he was unaware, particularly in light of Plaintiff's unreasonable failure to use available remedial opportunities, and that, once aware, Defendant took prompt, remedial action.").

A similar conclusion was reached by an Oklahoma district court applying the *Ellerth/Faragher* affirmative defense. *See Dedner v. State of Oklahoma*, 42 F. Supp. 2d 1254 (E.D. Okla. 1999). The plaintiff was allegedly harassed by her supervisor, but failed to report the harassment until approximately three months after the harassment began. *Id.* at 1260. The court found that the plaintiff had unreasonably failed to take advantage of the employer's preventive and corrective opportunities by failing to utilize its procedures until three months after the sexual harassment began. *Id.* The plaintiff failed to avoid harm occasioned by her supervisor's conduct prior to the date she made the complaint. *Id.*; *see also Mirakhorli v. DFW Management Co.*, No. 3:94-CV-1464-D, 1999 U.S. Dist. LEXIS 9344 (N.D. Tex. May 24, 1999) (holding that the employer was entitled to judgment based upon the *Ellerth/Faragher* affirmative defense where the employee failed to immediately report the harassment because the employer neither knew nor should have known about the harassing conduct until then).

Here, the Petitioner conveniently ignores her own corresponding duty to act reasonably to avoid harm. MTL has met its burden under the second prong of the affirmative defense because Petitioner unreasonably failed to avoid harm by failing to promptly report the alleged harassment by her supervisor. When she finally did so, MTL took reasonable and prompt corrective action. Had she fulfilled her duty when the alleged harassment began, MTL could have acted immediately to prevent the creation of a hostile work environment. However, in the absence of an earlier complaint, MTL cannot be held liable for conduct of which it was unaware.

The policy reasons cited above further demonstrate that MTL was entitled to summary judgment on Petitioner's Title VII claim.

II. The Questions Presented by the Petitioner are Not Unique, Nor Will the Case Have Far-Reaching Implications on Sexual Harassment Jurisprudence.

Most federal district courts and courts of appeals considering the employer's affirmative defense have applied it in accordance with the principles set forth by this Court in *Ellerth* and *Faragher*, and Congress' purpose in enacting Title VII. As this Court is well aware, the decisions applying the affirmative defense are very fact specific, and a decision denying or granting the relief requested by the Petitioner would not have far-reaching effects due to the fact-specific nature of this inquiry.

Petitioner complains that the Sixth Circuit's decision is erroneous because it does not make her whole and instead profits the alleged perpetrators. However, the Sixth Circuit's decision is in accordance with Congress' purpose in enacting Title VII. It provides an incentive to employers to prevent and promptly correct harassment, and it rewards those that act reasonably to do so by providing these employers with an affirmative defense to harassment charges. It fulfills the Congressional purpose of avoiding harm, rather than providing redress, where the employer acts appropriately.

MTL does not seek to deny the hardships that sexual harassment causes employees, particularly women, in the workplace. Nor is MTL insensitive to the need for effective preventive measures, and prompt and complete remedial measures. Its sexual harassment policy and prompt action in this case demonstrate that MTL takes allegations of such harassment very seriously.

However, employers cannot stop sexual harassment by themselves. To effectuate the deterrent purpose of Title VII, the victims of sexual harassment must do their part and take advantage of the preventive and corrective opportunities offered by their employers. They must promptly make the employer aware of the harassment. If the employee fails to do his or her part, as the Petitioner failed to do here, the employer cannot be expected to correct the harassment and should not be held liable for its occurrence.

MTL met its duty of reasonable care. However, the Petitioner failed in her corresponding duty to promptly report the harassment. The Sixth Circuit's application of the employer's affirmative defense is correct under the facts of this case.

CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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